Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment's privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production.

2. Whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Mr. Hubbell is respondent in these proceedings. In addition, Suzanna W. Hubbell, Michael C. Schaufele, and Charles C. Owen were parties to the proceedings in the district court and the court of appeals. We believe, however, that they are not affected by the issues raised in the petition and have no interest in its outcome. Sup. Ct. R. 12.4. First, those issues relate only to Mr. Hubbell's act of production. Second, and more definitively, all charges against those three individuals were dismissed on June 30, 1999, after the decision of the court of appeals below. We have, nonetheless, served counsel for those individuals with a copy of this petition.

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PETITION FOR A WRIT OF CERTIORARI

The United States of America, by Kenneth W. Starr, Independent Counsel, *see* 28 U.S.C. § 594(a)(9), respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 167 F.3d 552. The opinion of the district court (Pet. App. 113a-140a) is reported at 11 F. Supp. 2d 25.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 1999. Pet. App. 1a. The court denied a timely petition for rehearing and suggestion for rehearing

en banc on May 4, 1999. Pet. App. 141a-143a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be * * * compelled in any criminal case to be a witness against himself."

18 U.S.C. § 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> a court or grand jury of the United States,
>
> * * *
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

On April 30, 1998, a federal grand jury in the District of Columbia returned a ten-count indictment charging respondent Webster L. Hubbell ("Hubbell") and others with a variety of tax-related offenses. C.A. App. JA015-JA056. On July 1, 1998, the district court dismissed the indictment (as to all defendants) as beyond the jurisdiction of the Office of Independent Counsel and also (as to Hubbell alone) as a violation of his Fifth Amendment privilege against compelled self-incrimination. Pet. App. 113a-140a. On January 26, 1999, a panel of the court of appeals reversed both of those holdings and remanded the case to the district court for proceedings on the indictment. Pet. App. 1a-112a.

Because the legal standard that the court of appeals articulated on the self-incrimination question made it infeasible for the government to bring Hubbell to trial, the government filed a petition for rehearing and a suggestion for rehearing en banc. The court of appeals denied the petition and the suggestion, with four judges dissenting from denial of the suggestion. Pet. App. 141a-143a.

More recently, on June 30, 1999, Hubbell entered a conditional guilty plea to a superseding information concerning the conduct described in the indictment. That guilty plea is conditioned on the success of the government in obtaining review by this Court of the standard articulated by the court of appeals. As part of the plea agreement, the government has agreed to move to vacate Hubbell's conviction and sentence if this Court's decision does not materially alter the standard articulated by the court of appeals so that Hubbell's act of production immunity no longer poses a significant bar to his prosecution.

1. The questions presented by this petition arise from a subpoena issued to Hubbell in 1996 by a federal grand jury in the Eastern District of Arkansas. The subpoena sought production of a variety of specified business and income records. When Hubbell declined to comply voluntarily, the United States obtained an order compelling production under 18 U.S.C. §§ 6002, 6003. A few days after the district court issued the appropriate order, Hub-

bell appeared before the grand jury, produced a number of documents, and testified that the produced materials were the result of a complete search for documents responsive to the subpoena. Pet. App. 25a-26a.

The United States used the information contained in those documents, together with a variety of other investigative sources, to develop the various tax-related charges alleged in the indictment. Because all of the charges can be substantiated without the use of the documents produced by Hubbell, the government would have had no need to use the documents themselves at trial, although it did make substantial use of their contents in the investigation that led to the indictment. *See* Pet. App. 29a, 67a n.37.

2. The district court granted Hubbell's motion to dismiss the indictment on the ground that it violated his Fifth Amendment privilege. Pet. App. 128a-137a. The district court acknowledged the firmly established rule "that the contents of voluntarily prepared documents are never protected by the Fifth Amendment privilege" (Pet. App. 131a), but ruled nonetheless that the government could not, constitutionally, use the *contents* of the documents Hubbell produced. The court rested that ruling on its view that Hubbell's production of the documents constituted an implicit testimonial assertion of the existence of the documents. Pet. App. 133a-135a.

The district court did not dispute the government's assertion that it already knew that Hubbell maintained records of the types subpoenaed. Nor did the trial court indicate any respect in which it was incriminating for Hubbell to admit through his act of production that the documents existed. Still, the court held, the contents of the documents were protected by the Fifth Amendment privilege unless the government could establish that it

already was aware of "the existence of the information contained in the documents." Pet. App. 137a n.15.

3. The United States appealed, and the Department of Justice appeared as *amicus* urging reversal of the district court's decision on the Fifth Amendment issue. The court of appeals unanimously rejected the district court's holding that the government could not use the contents of the documents unless it could establish that it already was aware of the contents of the documents. Pet. App. 36a n.23.[1] But the panel divided on the question of exactly what the government must establish to permit its use of the contents of the documents.

a. The majority of the panel (speaking through a per curiam opinion authored, on the Fifth Amendment issues, by Judge Wald, Pet. App. 1a n.*) first considered whether the production of the documents was sufficiently testimonial to constitute a compelled testimonial communication. Pet. App. 36a-65a. On that point, the court rejected the government's argument that production was not testimonial because the existence of the documents was a foregone conclusion. *Compare Fisher v. United States*, 425 U.S. 391, 411 (1976) (explaining that the production of documents is not a testimonial admission if their existence is a "foregone conclusion"). The panel ultimately concluded that the existence of documents is not a foregone conclusion for purposes of the Fifth Amendment unless the government can "demonstrat[e] with reasonable particularity a prior awareness that the * * * documents sought in the subpoena existed and were in [the defendant]'s possession." Pet. App. 62a.

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[1] The court of appeals also reversed the district court on the jurisdictional issue. No party sought further review of that question in the court of appeals.

The court also rejected the government's argument that production of the documents was not incriminating because it constituted nothing more than an implicit admission that the defendant possessed several classes of customary business records. Building on its analysis of the foregone-conclusion question, the court determined that the act of production would be incriminating if the existence of the produced documents was not a foregone conclusion or if the act of production would authenticate those documents. Pet. App. 62a-65a.

Having concluded that the act of production in this case involved incriminating testimonial communications, the court finally turned to the larger question—the extent to which incriminating communications implicit in the act of production taint the theretofore unprivileged contents of the produced documents. Pet. App. 65a-72a. On that question, the court broadly held that *implicit* testimony that documents exist necessarily taints the contents of the documents, even in cases (like this one) in which the existence of the documents themselves (as distinguished from the information that they contained) was entirely irrelevant to the investigation and would be entirely irrelevant to any trial of the charges contained in the indictment. The court explained that, in its view, a contrary holding "essentially eviscerates the act of production doctrine." Pet. App. 68a.

b. Judge Williams dissented from the court's analysis of the Fifth Amendment questions. Pet. App. 100a-112a. In his view, this Court's decision in *Fisher* compelled the conclusion that the existence of the documents was a foregone conclusion, because "these papers' own physical presence [wa]s 'self-evident' at the time and place of production and so long thereafter as the government maintains proper custody." Pet. App. 105a. As he explained,

"[t]he particular documents' existence speaks for itself once they have been delivered." Pet. App. 106a.

Judge Williams also disputed the majority's conclusion that the testimonial aspects of the act of production tainted the contents of the documents. On that question, he expressly adopted the position advanced by the Department of Justice and by Judge Samuel Alito (writing extrajudicially)—that the contents of voluntarily prepared documents were not tainted by the act of production. Judge Williams explained: "[T]he act of production doctrine shields the witness from the use of any information (resulting from his subpoena response) beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven." Pet. App. 111a (citing DOJ Amicus Br. at 42; Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 59-60 (1986)).

4. Inasmuch as the panel majority's articulated standard made it infeasible to bring Hubbell to trial, and in view of the practical and legal significance of the majority's judgment, the United States filed a petition for rehearing and a suggestion for rehearing en banc. The court of appeals *sua sponte* called for the views of the Department of Justice, which filed an *amicus* brief detailing the practical difficulties that would attend the widespread adoption of the majority's viewpoint. The court of appeals nonetheless denied the petition for rehearing, with Judge Williams dissenting. Pet. App. 141a. With two judges recused, the nine member court denied the suggestion for rehearing en banc over the dissent of four judges. Pet. App. 142a-143a.

5. On June 30, 1999, after the mandate issued from the court of appeals, Hubbell entered a conditional guilty

plea to a superseding information covering conduct related to the indictment in this case. That plea is expressly conditioned on the government's success in further litigation with respect to the Fifth Amendment questions. Accordingly, the government has agreed that it will move to vacate Hubbell's conviction and sentence if this Court's decision on the Fifth Amendment questions does not adopt a standard under which Hubbell's act of production immunity no longer poses a significant bar to his prosecution.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision raises two intertwined questions with respect to the Fifth Amendment privilege against self-incrimination in cases in which the United States coerces the production of documents from recalcitrant witnesses under 18 U.S.C. § 6002. Both questions arise out of the tension between two important strands of this Court's Fifth Amendment jurisprudence. On the one hand, the Court in *Fisher* and in *United States v. Doe*, 465 U.S. 605, 611 (1984), articulated an understanding of the narrow scope of the Fifth Amendment privilege, categorically excluding from the privilege's ambit the contents of voluntarily recorded documents. Building on the analysis of *Schmerber v. California*, 384 U.S. 757 (1966), *Fisher* and *Doe* reason that the government's use of the *contents* of voluntarily recorded documents does not implicate the Fifth Amendment because the government has not compelled the exercise of the mental faculties that resulted in the creation of the documents. On the other hand, the Court in *Kastigar v. United States*, 406 U.S. 441 (1972), interpreted Section 6002 and the Fifth Amendment as barring any derivative use by a prosecutor of information delivered under compulsion of that Section: information derived from a compelled act of production is "fruit of the poisonous tree," as it were.

To put a complex matter simply, our view is that the important rights articulated in *Kastigar* are not implicated by the government's use of the *contents* of voluntarily recorded documents. The Fifth Amendment is implicated only if the government uses some compelled testimonial aspect of the act of production, that is, some aspect of the act of production *other than* the voluntarily recorded contents themselves. If the government does not so use any such aspect of the act of production, then the contents should not be viewed as "information directly or indirectly derived from" the act of production.

On both of the questions presented, the court of appeals generally took the opposite view. In effect, the panel majority interpreted *Fisher* and *Doe* narrowly and gave a broad sweep to *Kastigar*. On the majority's view, the "taint" of the act of production can infect the contents of documents otherwise categorically outside the scope of the Fifth Amendment privilege's protection. As the Attorney General explained to the court of appeals, that ruling has great practical significance, especially in the area of white-collar crime prosecutions. Review by this Court is necessary to bring clarity to this important and complex area of criminal procedure.

1. a. The first and broad question is whether a compelled testimonial communication implicit in the act of production taints the otherwise unprivileged, pre-existing contents of the produced documents. The question arises whenever the government makes investigative use of the contents of documents compelled under 18 U.S.C. § 6002, but does not need to prove the defendant's possession of the documents or the existence or the authenticity of the produced documents. The question is presented in its purest form whenever, as in this case, the government can prove the offenses alleged in the indictment without the

need even to introduce the documents produced by the defendant into evidence.

The court below resolved this question in a categorical fashion. The panel majority concluded that the compelled act of production taints the contents in any case in which the act of production includes any implicit testimonial admissions protected by the Fifth Amendment. *See* Pet. App. 71a ("If the [act of production implicates the Fifth Amendment], *Kastigar* forbids the derivative use of the information contained therein against the immunized party."); *id.* at 56a-57a n.33 ("[The government's] a posteriori knowledge [of the contents of documents] is inextricably linked to the communicative testimony inherent in the subpoena response.").

That holding gives no weight to this Court's repeated and emphatic statements that the Fifth Amendment privilege does not extend to the contents of voluntarily created documents. Because the statements contained in such documents exist prior to the exercise of compulsion, the statements necessarily were recorded independently of any relevant governmental compulsion. *See Doe,* 465 U.S. at 611 ("[Because] the preparation of all of the papers sought in these cases was wholly voluntary, * * * they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else."). Thus, there is no legally relevant causal link connecting the creation of the pre-existing statements and the compelled act by which they are produced to the government. Hence, it makes no sense to characterize those pre-existing statements as somehow "derived" from the testimonial admissions implicit in the subsequent act of production. The temporal order of the acts—creation first and then compelled production—renders any such link illusory.

The logical error infecting the decision of the court of appeals is that it collapses the non-testimonial and essentially physical act of production into the incidental testimonial admissions that sometimes are implicit in the act of production. Thus, the court of appeals views document production as a primarily testimonial matter, with some incidental unprivileged physical activity occurring on the side. *See, e.g.,* Pet. App. 50a n.31 ("[The act of producing documents] provides testimony *rather than* physical or real evidence.") (emphasis added). Indeed, the dispositive portion of the opinion (section II(B)(1)(d), Pet. App. at 65a-72a) ignores the rule that the Fifth Amendment does not protect the contents of documents.

It is more sensible to recognize that the government's possession of the documents is attributable solely to the non-testimonial act of production itself. Because production, simpliciter, is a physical act, the Self-Incrimination Clause does not regulate it in any way. *See Schmerber,* 384 U.S. at 764; Pet. App. 101a (Williams, J., dissenting) ("Where an item of information that a prosecutor receives from a document delivery flows from a non-testimonial aspect, he does not depend on any testimonial aspect [of the document delivery]."). At bottom, the privilege protects only information that is "derived from" the compelled testimonial communications implicit in the act of production. Contrary to the court of appeals's holding, it is not enough to show that information is the fruit of the physical act generally. It must be shown to be the fruit of some compelled testimonial communication. That is manifestly not the case here.

The illogical implications of the D.C. Circuit's rule are perhaps clearest in the pivotal concluding portion of its analysis. There, the majority defends its interpretation of the Fifth Amendment by describing this as a case in which "the testimonial value of document production is high,

and the government obtains a large quantum of information directly from the witness' mental faculties." Pet. App. 70a-71a. With all respect, that analysis is entirely wrong. The act of production in this case has absolutely no testimonial value—to prove the tax charges in the indictment, the government would not have needed to establish that *any* of the documents existed or were authentic, let alone that the defendant was in possession of them or produced them to the government—and the government obtained *no* useful information from compelled exercise of the witness's mental faculties. *Compare Schmerber*, 384 U.S. at 762 (explaining that, whatever the policies of the privilege might suggest in the abstract, the constitutional privilege always has forbidden only "the cruel, simple expedient of compelling [evidence] from [the defendant's] own mouth"). All of the useful information that the government obtained came from the *voluntary creation* of the documents. The relevant exercise of Hubbell's mental faculties occurred at the time the documents were created, long before the subpoena was served. Because none of the information was "derived from" Hubbell's compelled communications, all of the information should be available to the government's investigation and prosecution of Hubbell.

Nor is it any more persuasive for the court of appeals to state that our position "essentially eviscerates the act of production doctrine." Pet. App. 68a. For one thing, the court's formulation begs the question presented, namely the breadth of the doctrine: our position cannot eviscerate the doctrine unless we are incorrect in our understanding of the doctrine.[2] And on that point, our position is entirely consistent with this Court's decisions. It assuredly does *not* remove the force from this Court's discussion in *Fisher* and *Doe* of the possibly privileged fruits of an act of production. For example, consider a case in which the prosecution needs to show that the defendant was aware of the contents of a particular document that the defendant had produced under compulsion. The defendant's possession of the document at the time of the subpoena might be highly probative of the defendant's guilt. Nonetheless, in our view the prosecution could not prove that possession by relying on the defendant's compelled act of producing the document. But in a case (like this one) in which the government has no need to use any such implicit testimonial communications, it makes no sense—in causation, in logic, or in law—to conclude that the statements voluntarily recorded before the initiation of compulsion are "derived from" some testimonial communication that might be implicit in the act of production and not from the unprotected act of production itself.

[2] For the same reason, the language of the statute affords no independent support to respondent. If the contents themselves are obtained by the government free of the taint of the compelled testimonial aspects of the act of production, then information derived from use of the contents cannot be "derived from" the compelled production. The question, of course, is whether the voluntarily recorded contents can ever be tainted by the simple, physical act of compelled production that delivers the documents to the government.

b. Not surprisingly, the court's decision conflicts with all of the decisions of the other courts of appeals that have considered similar questions. Indeed, although the courts of appeals have experienced difficulty in applying a number of aspects of the act-of-production doctrine, the courts have treated the question presented here as an easy one. Thus, the lower courts have responded dismissively to arguments such as the one embraced by the court of appeals, based on the view that *Fisher* and *Doe* make the point quite clear. For example, in *United States v. Neely*, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996)

(unpublished) (per curiam), the Fourth Circuit considered an appeal from a district court decision that permitted the government's investigative use of documents produced pursuant to compulsion under Section 6002. *See id.* at *8. The court of appeals readily agreed with the district court that the defendant "possessed no Fifth Amendment right with respect to the contents of th[e voluntarily created] documents." *Id.* at *9. As the court of appeals explained, "although the Government was barred from using Neely's act of producing [the documents] against him, it was free to use the contents of [the documents] against Neely." *Id.* at *9.[3] A similar ruling in this case would have left the government free to proceed against Hubbell.

The courts of appeals frequently have considered the same problem in cases in which defendants have resisted subpoenas on the ground that the subpoenas would force them to deliver protected information contained in the documents. In each of those cases, the courts have rejected the defendant's claim, reasoning that *Fisher* and *Doe* compel the conclusion that the contents would not gain any protection from their delivery in a compelled act of production. For example, in *United States v. Municipal Bond & Collection Servs., Inc.*, 810 F.2d 46 (3d Cir. 1987), the IRS issued a summons seeking business records from a small corporation. The president of the corporation resisted the subpoena, arguing that he would incriminate himself if he produced the documents in question.

[3] *Neely*'s unpublished status does not undermine its precedential value in the Fourth Circuit. *See* 4th Cir. R. 36(c) ("If counsel believes * * * that an unpublished disposition of any court has precedential value in relation to a material issue and that there is no published opinion that would serve as well, such disposition may be cited."). Rather, it suggests only that the Fourth Circuit found our position to be so obviously correct that publication was not necessary for elucidation of the law.

The district court granted immunity that barred the government from using the act of production as evidence against the individual president. *See id.* at 47-48. The president appealed, arguing that the district court also should have barred use of the documents themselves. The Third Circuit firmly rejected that argument, viewing "[t]he contention that the court should have granted 'derivative immunity' [a]s simply an effort to extend immunity to the contents of the records" and concluding that "[t]he argument has no merit." *Id.* at 49.

Similar holdings on that question have come from the Second and Ninth Circuits. Thus, the Second Circuit in *In re Proceedings Before the Aug. 6, 1984 Grand Jury (United States v. Doe)*, 767 F.2d 39 (1985) (per curiam), refused to quash a subpoena for a tape recording, explaining that "[t]he act of producing business records may * * * have a testimonial character and fall within the fifth amendment's coverage, but the contents of voluntarily prepared business records are not privileged unless the subpoenaed individual is compelled to 'restate, repeat, or affirm' the contents' truth." *Id.* at 41 (quoting *Fisher*, 425 U.S. at 409). Similarly, the Ninth Circuit in *In re Grand Jury Proceedings on Feb. 4, 1982 (United States v. Terry)*, 759 F.2d 1418 (1985), affirmed a district court's order compelling production of documents. That court explained that *Doe* "has now made it clear that regardless of the precise characterization of the disputed papers, the contents of such documents are not privileged under the fifth amendment in the absence of some showing that creation of the documents was the product of compulsion." *Id.* at 1419. On the case before it, the Ninth Circuit's reasoning was simple: "Terry does not contend that he created the requested documents under any compulsion. Therefore, the contents of the documents are not privileged." *Id.* at 1420.

Under these decisions, the government would be permitted to use evidence derived from the contents of the preexisting, voluntarily recorded documents that Hubbell delivered to the government under compulsion. Because the court of appeals's decision prohibits that course of action, it conflicts with those decisions.

2. The court of appeals would not have reached the first question if it had not launched its analysis with an improperly crabbed application of the foregone-conclusion doctrine articulated in *Fisher*. The majority's construction of the law misreads *Fisher* and conflicts with the Fourth Circuit's decision in *United States v. Fishman*, 726 F.2d 125 (4th Cir. 1983).

a. The conflict with *Fisher* goes to the heart of the D.C. Circuit's decision. The reasonable particularity standard adopted by the court of appeals, Pet. App. 62a, drains the forgone-conclusion doctrine of all force. For all practical purposes, the identity of a document is determined by its contents. Only by its contents—what it says, not its shape, size, or texture—may a document be described with any particularity, for it is those contents that give the document significance. Thus, a standard requiring identification of a document with reasonable particularity is, in effect, a standard that demands a particularized knowledge of the contents of the documents.

Hence, in practice the court of appeals has done in a more intricate way the same thing for which it criticized the district court: the decision essentially requires advance knowledge of the contents of a document as a prerequisite of a right to use the document's contents. That is a daunting standard that no prosecutor is ever likely to meet, and one that effectively would have precluded Hubbell's prosecution here. We draw little comfort from the view of the court of appeals that, "[t]o the extent

that any assessment of the government's knowledge requires something in the nature of a 'metaphysical classification,' * * * the district courts are up to the task." Pet. App. 59a n.34.

To reach this result, it was necessary for the court of appeals to mischaracterize *Fisher* as a case in which the government "had highly specific knowledge as to the existence * * * as well as the location" of the documents. Pet. App. 33a. But the subpoena in that case, much like the subpoena here, called generally for accountant's workpapers, retained copies of income tax records, and correspondence, all for specified individuals and years. *See Fisher*, 425 U.S. at 394. And the *Fisher* Court's explanation of its decision includes not a word of any specific knowledge the government might have had about those papers, a remarkable situation if (as the majority held here) the decision turned on the government's possession of particularized knowledge of the subpoenaed documents. *See Fisher*, 425 U.S. at 411 ("The papers * * * are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents."). Indeed, only Justice Brennan (who chose not to join the Court's opinion) seems to have thought that the government's knowledge was relevant. *See* Pet. App. 37a (citing government's knowledge of documents as reported in Justice Brennan's opinion).

The court of appeals also suggests that its narrow reading of *Fisher* is justified by a retreat from *Fisher* in *Doe*. Pet. App. 34a-35a & 37a-39a n.24. The *Doe* opinion cannot bear the reading that the court of appeals attributes to it. The Court in *Doe* briefly mentioned the lower-court finding that the production there implicated the Fifth

Amendment, noted that the finding "essentially rest[ed] on [the lower court's] determination of factual issues," 465 U.S. at 613-14, and then moved on to address the questions on which it had granted review. Nothing in that passage—which refers directly to the passage in *Fisher* that we discuss above—suggests any intention to disavow or distinguish *Fisher*. *See* Pet. App. 105a-106a (Williams, J., dissenting); *see also Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents. Until that occurs, [each of our prior cases] is law * * *.").

b. The reasonable-particularity standard also conflicts with the Fourth Circuit's decision in *Fishman*. In that case, a federal grand jury issued a subpoena for patient medical records for a specified period. *See* 726 F.2d at 126 n.1 (quoting the operative language of the subpoena). The doctor refused to comply, was held in contempt, and appealed. The Fourth Circuit affirmed, stating: "Being business records of Dr. Fishman, their existence in the circumstances of this particular case and his possession or control are self-evident truths, and hardly need to be proven through resort by the Government to the act by the owner in turning them over." *Id.* at 127. The Fourth Circuit's decision did not assume any particularized knowledge of the documents; indeed, the court expressly rejected the government's argument that it had advance knowledge of matters beyond the existence of general categories of documents. *Id.* at 127 n.4. Thus, *Fishman* holds that the Fifth Amendment is not implicated by a subpoena for categories of ordinary business records even if the government has no particularized knowledge of the documents that exist within those categories.

The court of appeals rejected that analysis as irrelevant, based on the view that the *Fishman* court was addressing "the question of potential incrimination." Pet. App. 40a. But it is no answer to say that the Fourth Circuit's holding would not apply here because *Fishman* can be characterized as arising under a different paragraph of the *Fisher* opinion than the one containing the analysis on which we rely: the fact is, this case would have been decided differently by the Fourth Circuit. Moreover, the *Fishman* court quite directly refers to the foregone-conclusion doctrine, which we raise here, when it states that the existence of the documents was a "self-evident trut[h]." *Compare Fisher*, 425 U.S. at 411 (explaining that the Fifth Amendment does not protect a defendant's implicit testimonial assertion that a handwriting exemplar is his own because that assertion is "self-evident"). The Fourth Circuit's view of the foregone-conclusion doctrine, as applied in *Fishman*, conflicts with the judgment of the court below that the doctrine does not apply here.

3. The abstract, philosophic tone of the court below might suggest—at first glance—that the case involves highly theoretical issues. While that may well be, the decision below also has great practical import for the criminal justice system. That is not the view solely of a temporary, inferior officer of the Executive Branch. That is the view of the Justice Department, which is vouchsafed with assessing the practical consequences of this manifestly noteworthy decision of the D.C. Circuit. To use the words of the Department (from its filing in support of our suggestion for rehearing en banc), the decision "is likely to impose significant burdens on the prosecution of a specific category of criminal investigations." DOJ Reh'g Response 9. As the Department explained, the decision will create a frequent problem in document-heavy

cases involving individuals and other sole proprietors, especially "a tax or health care fraud investigation [in which it may be appropriate to] seek all of the records of a physician who runs his practice as a sole proprietorship." *Id.*

The difficulty is not just that the court has imposed a burden on the government that exceeds what this Court could have contemplated in *Fisher*, but that the vague standard will spawn needless litigation in the federal district courts. For one thing, it seems unlikely that there will be any substantial category of cases in which a prosecutor will be sure that the "reasonable particularity" standard has been satisfied. *See* DOJ Reh'g Response 9 ("[T]he government will rarely be able to predict with 'reasonable particularity' each of the documents it will receive in response to the subpoena."). Thus, a prudent prosecutor contemplating the compulsion of documents will be forced—as a practical matter—to litigate the question at the time of production.

In the common situation in which a document-intensive investigation does not lead to an indictment, litigation over the ramifications of the document production will be a complete waste of the time of the federal courts. Whatever the merits of the question, it cannot be that this Court in *Fisher* and *Doe* thought it had created a standard calling for litigation in every case of compelled document production. Because of its wide practical implications, the contrary reasoning of the D.C. Circuit warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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